Supreme Court, U.S.
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No. 98-1426

In The

Supreme Court of the United States

October Term, 1998

BATJAC PRODUCTIONS, INC.,
a California corporation,

Petitioner,

vs.

GOODTIMES HOME VIDEO CORPORATION,
a Delaware corporation; and
MARYBETH PETERS, REGISTER OF COPYRIGHTS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the U.S. Court of Appeals for the Ninth Circuit err in holding that those portions of draft screenplays contained in the public domain motion picture "McLintock" attained statutory copyright with the motion picture in 1963 and entered the public domain in 1991 when petitioner Batjac Productions, Inc. ("Batjac"), the owner of the screenplays and the film, failed to renew the motion picture copyright?

DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule of Procedure 29(6), Respondent GoodTimes Home Video Corp. ("GoodTimes") has no parent corporations and no non-wholly-owned subsidiaries.

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

Petitioner Batjac produced a motion picture entitled "McLintock." The film was published on November 1, 1963 and was duly registered for copyright. It is conceded that the motion picture copyright was not renewed in 1991 and that the film is now in the public domain. (Petition for Certiorari ("Petition") at 5.) As is almost uniformly the case, the motion picture was produced from a screenplay, several drafts of which were written in or about 1962 by James Edward Grant. On October 18, 1962, Grant assigned to Batjac all of his rights in the draft "McLintock" screenplays, including "all draft versions and adaptations," with the "unqualified right to use said work, in whole or in part, in whatever manner [Batjac] may desire." Grant died in 1966.

More than thirty-two years after the publication of the film and more than four years after the film passed into the public domain, Batjac applied to register two intermediate drafts of the motion picture screenplay for copyright as "unpublished" works. The Copyright Office declined to register the portions of the screenplays that were contained in the public domain film. With this limitation, the Copyright Office offered to register the balance of the screenplays, but this offer was refused.

On February 23, 1996, while its application to register the draft screenplays was pending but before the Copyright Office had issued its rejection, Batjac commenced an action against GoodTimes in the United States District Court for the Southern District of New York alleging

infringement of its purported common law copyright in those drafts. GoodTimes had commenced the sale and distribution of the public domain motion picture in home-videocassette format in 1993.[1] After the Copyright Office rejected Batjac's application, the Register of Copyrights intervened in the action pursuant to 17 U.S.C. § 411(a).

Thereafter, the action was transferred to the United States District Court for the Central District of California to facilitate its consolidation with a previously filed action, *Maljack Productions, Inc. and Batjac Productions, Inc. v. UAV Corp.*, Case No. 96-0749 DDP VAPx (the "UAV action"), which raised the identical issue of whether valid copyrights existed in the draft "McLintock" screenplays. On January 30, 1997, the district court entered an order consolidating the case against GoodTimes with the UAV action solely for purposes of determining the registrability for copyright of the two draft screenplays. All parties moved for summary judgment on this issue.

On May 22, 1997, the district court entered an order granting the Register's and GoodTimes' cross-motions for summary judgment, finding that the Register correctly refused to register the draft "McLintock" screenplays because they secured statutory copyright with the motion

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[1] Maljack Productions, Inc., to whom Batjac had assigned all of its right, title and interest in the film in the videocassette format, brought suit against GoodTimes in 1993 alleging, *inter alia*, copyright infringement, violation of the Lanham Act and infringement of state law rights in the motion picture soundtrack. All of these claims were ultimately dismissed. *See Maljack Productions, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881 (9th Cir. 1996).

picture and passed into the public domain when the copyright was not renewed. (*See* Petition, Appendix 2.) This decision and order was affirmed by the United States Court of Appeals for the Ninth Circuit in a decision issued on November 5, 1998. (*See* Petition, Appendix 1.)

II. REASONS FOR NOT GRANTING THE WRIT

The instant petition concerns an issue of federal copyright law that has been addressed by four circuit courts of appeal during the last twenty years. One of those decisions was that of the Ninth Circuit below, while the others were *Classic Film Museum, Inc. v. Warner Bros., Inc.*, 597 F.2d 13 (1st Cir. 1979), *Harris Custom Builders, Inc. v. Hoffmeyer*, 92 F.3d 517 (7th Cir. 1996) and *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 1999 WL 73980 (2d Cir., February 3, 1999). These decisions address the issue raised in this petition: whether common law copyright in a work is extinguished under the Copyright Act of 1909 (the "1909 Act") when that work attains statutory copyright through registration with the Copyright Office and publication with notice thereafter, or, in the case of *Harris*, falls into the public domain through incorporation into a work published without notice. All of these decisions resolve the issues in favor of GoodTimes' position here.

This unanimity of opinion is not surprising. It was settled law for nearly eighty years that common law copyright in a work was forfeited when that work attained statutory copyright, as reflected by the consistent practices of the Copyright Office and the opinions of commentators in the field. During the past five years, several district court decisions, seizing on isolated *dicta* in

this Court's decision in *Stewart v. Abend*, 495 U.S. 207, 110 S. Ct. 1750 (1990), created some confusion on the issue, but the error of those district court decisions has now been established by the circuit court opinions set forth above. In the absence of a conflict in circuit court authority or an unsettled question of law making review by this Court appropriate, the petition should be denied.

A. The "McLintock" Screenplays Attained Statutory Copyright When the Motion Picture Was Published With Notice in 1963

The Ninth Circuit correctly concluded below that the "McLintock" draft screenplays were published by the motion picture to the extent that they were incorporated into the film. (Petition, A-16-17.) As a result, the draft screenplays attained statutory copyright with the motion picture in 1963 and fell into the public domain with the motion picture in 1991 when the motion picture copyright was not renewed. Batjac argues in its petition, as it has throughout this action, that the draft screenplays retained common law copyright protection after 1963, notwithstanding their incorporation into the published motion picture, and that it therefore retains a right to enforce its copyright in those screenplays. Batjac's argument is without merit. Indeed, it conflicts with well-reasoned circuit court authority and the opinions of all leading commentators in the field.

One such decision is *Classic Film Museum, Inc., supra,* in which the First Circuit concluded that an action for infringement of alleged common law copyright in the unregistered motion picture screenplay for the film "A

Star is Born" and the unregistered story from which the screenplay was prepared could not be maintained following the expiration of the statutory copyright in the motion picture. The court held that the owner of the copyright in the motion picture could not be permitted to avoid the limited term of the film's statutory copyright by asserting a common law copyright in the screenplay and the story from which the film was made. The court reasoned that any other conclusion would conflict with the statutory and constitutional requirement that copyright exist for a limited term and would lead to a result which "cannot be countenanced." 597 F.2d at 15. The Ninth Circuit relied heavily on the logic of *Classic Film* in reaching its decision below (Petition, A-22-23), and properly so, for the case is on all fours here.

Batjac offers two criticisms of the circuit court's reliance on the decision in *Classic Film*. First, Batjac contends that the *Classic Film* court did not reach the question of whether the publication of the film published the screenplay. However, since the elements of the screenplay and story contained in the film were protected by the statutory film copyright, the *Classic Film* court did not have to decide that the screenplay and the story were also published by the film. That the elements of those two works contained in the film achieved statutory copyright when the film's copyright was secured was a separate basis for the Court to hold they were no longer protected by common law, independent of whether the screenplay and story were "published."

The defect in Batjac's alternative argument that passage of the 1976 Copyright Act renders the decision in *Classic Film* irrelevant is two-fold. In the first instance,

whether the "McLintock" draft screenplays, as reflected in the film, attained statutory copyright in 1963 must be determined under the law as it existed at that time. If the screenplays, as reflected in the film, had exchanged common law protection for statutory protection before the effective date of the 1976 Act, nothing in the 1976 Act reinvested them with common law rights. Thus, the 1976 Act is irrelevant to the resolution of the issue posed here.

In addition, it ignores the fact that the district court, whose opinion the First Circuit expressly adopted, *see* 597 F.2d at 15, *did* consider whether its decision would be altered by the 1976 Copyright Act and concluded that it would reach the same conclusion. *Classic Film Museum, Inc. v. Warner Bros., Inc.*, 453 F. Supp. 852, 856 n.4 (D.Me. 1978).

Another decision upon which the courts below expressly relied that is contrary to Batjac's argument is *Harris Custom Builders, Inc. v. Hoffmeyer, supra.* In that case, the Seventh Circuit held that publication of abbreviated drawings derived from unpublished blueprints by the owner of the blueprints amounted to a publication of the blueprints to the extent reflected in the drawings. 92 F.3d at 519-20. Similarly, the publication of the "McLintock" motion picture effectively published the screenplays to the extent reflected in the motion picture, as both courts below held.

Batjac attempts to distinguish *Harris* on the ground that the motion picture and its screenplays are in different media, but this supposed distinction is meaningless, as shown by *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 32 S. Ct. 20 (1911), in which this Court held that a motion

picture infringed the copyright in the novel *Ben Hur*. Further, Batjac cites to nothing in the 1909 or 1976 Copyright Acts nor any case decided under either statute that draws any distinction based on the medium in which the reproduction of a work is distributed.

Batjac's alternative argument that *Harris* is limited to the 1976 Act and has no application to the 1909 Act (Petition at 21) is premised on an outrageous editing of a single sentence. The omitted language establishes that the court qualified its ruling only to make clear that it had no application to publications after March 1, 1989, the effective date of the Berne Convention Implementation Act of 1988, which abolished the notice requirement as a condition of copyright.[2] *See* 17 U.S.C. § 405(a). Batjac offers no basis for distinguishing between the 1909 Act and the 1976 Act insofar as the *Harris* court's conclusion that a publication of a derivative work constitutes a publication of the pre-existing works contained therein.

Finally, if there were any doubt on the matter, it is resolved by the decision issued by the Second Circuit in *Shoptalk, Ltd. v. Concorde-New Horizons Corp., supra,* after the Ninth Circuit issued its decision in this case. In *Shoptalk,* the Second Circuit held that the publication of the motion picture "Little Shop of Horrors" in 1960 published the screenplay for that motion picture to the extent such

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[2] The full text of the sentence in *Harris* is "[o]ur analysis is relevant only to cases, such as this one, which arise under the 1976 Copyright Act, *prior to its amendment by the Berne Convention Implementation Act.*" (Emphasis added to portion omitted from quotation contained in Petition at 21.) 92 F.3d at 517.

screenplay was disclosed in the film. The consequence of this publication meant that the copyright in the "Little Shop of Horrors" screenplay, like that for the motion picture, expired when it was not renewed in 1988. In its petition, Batjac makes no effort to distinguish *Shoptalk* on its facts or its holding, for its similarities on both the facts and the law are too obvious to be overlooked. Instead, Batjac simply argues that the decision was wrong.

In doing so, Batjac repeatedly relies on the district court's decision in *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 897 F. Supp. 144 (S.D.N.Y. 1995) as support for its arguments, at times seeming to forget that this decision, upon which it heavily relied below and that the Ninth Circuit expressly declined to follow (A-20, n. 12), has been reversed and its reasoning rejected. (Petition at 23.) Similarly, the Second Circuit's *Shoptalk* decision obviously casts doubt on one of the other district court decisions upon which Batjac relied both below and in its petition, *Jim Henson Productions, Inc. v. John T. Brady & Assoc.*, 867 F. Supp. 175 (S.D.N.Y. 1994).[3]

The opinions of all leading commentators in the field are also contrary to Batjac's position. *See* 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 4.12[A]; Boorstyn, *On Copyright*, § 4.08 at pp. 4-9 ("The generally accepted (and

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[3] Another decision supporting the Ninth Circuit's holding below was the prior decision of that court in *La Cienaga Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995), which adopted the general rule that publication of a derivative work publishes any underlying work that it reproduces, applying it to the peculiar problem posed by sound recordings.

better) view is that publication of a derivative work constitutes publication of the preexisting work on which it is based.").

The net result leaves Batjac with no relevant authorities to support the contentions expressed in the Petition and an array of authorities from various circuit courts and treatises aligned against it. As for Batjac's now desperate attempt to transform section 7 of the 1909 Act into a life preserver to save its case, its argument is refuted by the text of the Act itself and many of the foregoing authorities.

B. Section 7 of the 1909 Act Does Not Save Batjac's Case

Section 7 of the Copyright Act of 1909 provides:

> Compilations or abridgements, adaptations or arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright, but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works or to secure or extend copyright in such original works.

Batjac argues that this provision protects the value of its "subsisting copyright," *i.e.*, the purported common law copyright it supposedly retained in the draft "McLintock"

screenplays. However, both courts below held that the term "copyright" as used in Section 7 of the 1909 Act applied solely to statutory copyrights, and that the statute had no application to works protected by the common law. The Second Circuit in *Shoptalk, supra*, reached the identical conclusion. 1999 WL 73980 at *7. The validity of these holdings is confirmed by the text of the 1909 Act and the manner in which it has been interpreted for decades by the Copyright Office.

The 1909 Act repeatedly uses the term "copyright" in a manner that could only refer to statutory copyright, not common law copyright. For example, Section 10 of the Act provided that "[a]ny person entitled thereto by this title *may secure copyright* for his work by publication with the notice of copyright required by this title" (emphasis added), and Section 12 of the Act provided alternatively that "[c]opyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright of one complete copy of such work." One cannot read these provisions to cover common law copyrights, so the necessary implication is that the term "copyright" used in these provisions applies only to statutory copyright. *Shoptalk*, 1999 WL 73980 at *7. Since it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479, 112 S. Ct. 2589, 2596 (1992), the use of the term "copyright" in Section 7 must likewise be construed to apply only to statutory copyright.

The interpretation of Section 7 offered by Batjac is also contrary to the longstanding policy of the Register of Copyrights, which has consistently adhered to the view

that portions of screenplays embodied in motion pictures are published upon publication of the motion picture. *See* U.S. Copyright Office, Compendium of Copyright Practices II at § 910.04 (1984). As the federal agency charged with administering the copyright laws, the Register's views as to how the statute should be interpreted are controlling, provided they are reasonable and not arbitrary, capricious or manifestly contrary to the provisions of the Copyright Act. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency"); *accord Mazer v. Stein*, 347 U.S. 201, 213-14, 74 S. Ct. 460, 468 (1954) (listing "practice of the Copyright Office" among the determinative elements in construction of statute).

C. The Decisions Below Are Not Contrary to *Stewart v. Abend*

In spite of all of the authorities described above, Batjac argues that an isolated sentence in *Stewart v. Abend*, *supra*, divorced from its context, compels the conclusion that Section 7 of the 1909 Act was intended to preserve common law copyright in material reproduced in derivative works. (Petition at 10-11.) Both the district court and the Ninth Circuit concluded below that the statement from *Stewart* was *dicta* and was neither binding nor persuasive. (Petition, A-17-22, B-14-20.)

In reaching this conclusion, both courts were clearly correct. The statement in *Stewart*, which Batjac contends

is controlling, is classic *dicta* insofar as it relates to unpublished works. *Stewart* resolved a problem arising under Section 24 of the 1909 Act. Since the problem in *Stewart* resulted from the statutory provision governing the renewal term for a published short story that had been registered for copyright, common law rights were not implicated in the case, a fact the Second Circuit recognized in *Shoptalk, supra*, 1999 WL 73980 at *8. *A fortiori* any reference to unpublished works in *Stewart* was wholly unnecessary to the decision. The portion of the statement upon which Batjac relies is therefore *dicta*. *E.g.*, *National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 187, 102 S. Ct. 216, 227 (1981) (characterizing statements unnecessary to a previous decision as *dicta*).

As far back as 1821, this Court strongly cautioned against the practice of relying on any *dicta*, even its own, to control the outcome of subsequent cases.

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400, 5 L.Ed. 257 (1821) (Marshall, J.). In the intervening 178 years, this Court has repeatedly emphasized that statements unnecessary to a decision are not binding in subsequent cases for the "obvious" reasons set forth in *Cohens*. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24, 115 S. Ct. 386, 391 (1994) ("This seems to us a prime occasion for invoking our customary refusal to be bound by *dicta*. . . . "); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775, 88 S. Ct. 1344, 1364 (1968) (" . . . this Court does not decide important questions of law by cursory *dicta* inserted in unrelated cases. Whatever the *dictum's* meaning, we do not regard it as decisive here.").

Thus, the decision by the Ninth Circuit to reject Batjac's proffered interpretation of the sentence from the *Stewart* decision was clearly correct. Moreover, the Ninth Circuit did so not by simply dismissing this portion of *Stewart* as a "mistake" as Batjac claims (Petition at 12), but after carefully reviewing the decision and concluding that it had no application to these facts and that Batjac's interpretation of the isolated phrase was incorrect. (Petition, A-17-22.)

In fact, Batjac's contention that the portion of the sentence upon which it relies is not *dicta* divorces the sentence from its context. Throughout its discussion of Section 7, the Court in *Stewart* repeatedly makes clear that it construes Section 7 of the 1909 Act to refer to works that are copyrighted in accordance with the statute. Indeed, the Court states in *Stewart* that Section 7 applies only to previously published works, either copyrighted or in the public domain:

> The provision [Section 7] consists of one sentence with two clauses divided by a semicolon. The first clause lists the types of works that may be derivative works, *explains that one may incorporate either copyrighted or public domain works into a derivative work,* and further explains that the derivative work is itself copyrightable.

495 U.S. at 231, 110 S. Ct. at 1765. (Emphasis added.) Construing Section 7 with Section 3, the Court further states:

> Important for this case is that § 3 provides that *one can obtain copyright in a work where parts of the work are already copyrighted.* For example, one could obtain a copyright in an opera even though three of the songs to be used were already copyrighted. *This, and only this, is what is meant in Section 7 when it states that* '[c]ompilations or abridgements, adaptations, arrangements, dramatizations translations or other versions of works . . . or works republished with new matter shall be regarded as **new works** subject to copyright under the provisions of this title.'
>
> More important, however, is that under the express language of Section 3, *one obtains a copyright on the entire work, but the parts previously copyrighted get copyright protection only according to the 'duration or scope' of the already existing copyright.*

495 U.S. at 234, 110 S. Ct. at 1767. (Bold in the original, other emphasis added.) The Court concludes:

> Clearly, the 1909 Act's plain language requires that the *underlying work's copyright term* exists *independently* of the *derivative work's term,* even

> when incorporated and even though the derivative work holder owns copyright in the whole 'work'.

495 U.S. at 235, 110 S. Ct. at 1767. (Emphasis added.)

This Court's discussion of Section 7, properly read, does nothing more than assert the wholly unremarkable proposition that a copyright might be secured in a new work, though it contained or was based upon public domain or previously copyrighted works. If the underlying work was copyrighted, nothing the derivative work owner did or failed to do altered or affected the scope or validity of the underlying copyright. Here, the issue is whether an unregistered work (the draft "McLintock" screenplays) retained any common law protection to the extent contained in the published motion picture. *Stewart* has no application to this issue.

III. CONCLUSION

WHEREFORE, for all of the reasons described above, Respondent GoodTimes Home Video Corp. respectfully submits that this Court should deny the instant petition for a writ of certiorari, as the decisions below were correct applications of well-settled legal principles to the facts of this action, and there is no issue warranting review by this Court.

Respectfully submitted,

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